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Oct. 7. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 251.

HAMILTON N. ELDRIDGE AND FREDERICK W. TOURTELOTTE, PLAINTIFFS IN ERROR,

vs.

JAMES HILL, TREASURER OF THE COUNTY OF ST. JOSEPH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 18, 1875.

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1 UNITED STATES OF AMERICA:

The Supreme Court of the United States.

HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte, plaintiffs in error,
vs.
JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county, defendant in error.

STATE OF MICHIGAN,
S't Joseph County, ss:

The circuit court for the county of S't Joseph.

To the sheriff of the county of S't Joseph, greeting:

In the name of the people of the State of Michigan, you are hereby commanded to summon H. N. Eldridge and F. W. Tourte-
[SEAL.] lotte, whose full given names are unknown, persons composing the firm of Eldridge & Tourtelotte, defendants, to be and ap-
2 pear before the circuit court for the county of S't Joseph, at the court-house, in the village of Centreville, in said county, upon the third day of December, A. D. 1872, at ten o'clock in the forenoon of that day, then and there to answer unto James Hill, treasurer of the county of S't Joseph, for the use and benefit of said county, plaintiff, in a plea of trespass on the case on premises, to the damage of said plaintiff of five thousand dollars, which shall then and there be made to appear; and have you then and there this writ with your doings thereon.

Witness the Hon. Charles Upson, circuit judge of the circuit court for the county of S't Joseph, at the village of Centreville, in said county, this 22d day of November, in the year of our Lord one thousand eight hundred and seventy-two.

JOHN C. JOSS, *Clerk.*

T. C. CARPENTER,
Att'y for Plaintiff and Prosecuting Attorney.

STATE OF MICHIGAN,
S't Joseph County, ss:

I hereby certify and return that, on the 22d of November, A. D. 1872, I personally served the within summons on the within-named F. W. Tourtelotte, one of the within-named defendants, by delivering to him a true copy thereof, and at the same time showing to him this writ with the seal of the court impressed thereon.

CYRUS E. PIERCE,
Under Sheriff.

Fees, $2.70.

STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
H. N. ELDRIDGE AND F. W. TOURTELOTTE, composing the firm of Eldridge & Tourtelotte.

It is hereby stipulated in this cause by and between T. C. Car-

penter, prosecuting attorney and attorney for plaintiff, and Ball
3 & Wolcott, attorneys for defendant Tourtelotte, that the plaintiff may have fourteen days, from and after the date hereof, to file declaration, and that the defendant Tourtelotte may have thirty days, from and after the expiration of the time herein agreed, for filing a declaration, to demur, plead, or make such pleading or motion as shall be deemed by him or his attorneys advisable.

Centreville, Dec. 30th, 1872.

T. C. CARPENTER,
Pros. Att'y and Pl'ffs Atty.

BALL & WOLCOTT,
Att'y for Def't Tourtelotte.

STATE OF MICHIGAN,
County of S't Joseph, ss:

In the circuit court for the county of S't Joseph.

James Hill, treasurer of S't Joseph County, for the use and benefit of said county, plaintiff herein, by Talcott C. Carpenter, his attorney and prosecuting attorney of said county, complains of Hamilton N. Eldridge and Frederick W. Tourtelotte, persons comprising the firm of Eldridge & Tourtelotte, who were summoned to answer the said James Hill, treasurer of the county of S't Joseph, for the use and benefit of said county, under the name of H. N. Eldridge and F. W. Tourtelotte, persons composing the firm, of a plea of trespass on the case upon premises. For that whereas heretofore, to wit, before the time of the making of the premises and undertakings contained in the contract next hereinafter set forth, and on the 28th day of June, A. D. 1872, there was stolen from the office of the register of deeds of the county of S't Joseph, among others, the following-named books and papers, that is to say: volumes C, E, F, G, & H, and numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, 20,
4 21, 22, and 54 of deeds; volumes A, B, & C, and numbers 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 24 of mortgages; volume 1 of levys, and volume 1 of lis pendens; four volumes of entry books, and one book of attachments, and a large number of other books and papers, the records of said county, of which said books and papers no definite clue could be ascertained which would tend to lead to their recovery until the sixth day of September, A. D. 1872, when the said defendants, professing their ability to successfully search, negotiate for, and procure the return of all and singular the said books and papers, entered into a written contract to procure the return of said books and papers each and every one thereof, in as good condition as when taken away, within a certain time therein stated, for a certain consideration therein stated, to be deposited with the said defendants, and in case the said contract should not be performed on the part of said defendants, then the said consideration so deposited to be returned to the plaintiff herein, which said contract was and is in the words and figures following, that is to say:

"Whereas there was lost from the office of the register of deeds of the county of S't Joseph and State of Michigan, on the night of the 28th day of June, A. D. 1872, among others, the following books and papers, to wit: Volumes C, E, F, G, and H, and Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 54 of deeds; volumes A, B, and C, Nos. 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 24 of mortgages; volume 1 of levys, and volume 1 of lis pendens, 4 volumes of entry books, 1

book of attachments, besides a large number of other books and papers; and whereas the supervisors of said county are anxious to obtain possession of all of said lost books and papers; and whereas certain persons have been engaged for some time endeavoring to get said books and papers for said supervisors: Now, therefore, the said supervisors have agreed, and do hereby agree, that in case all of said books and papers so taken from said office of said register at said time shall be returned to said county and to said supervisors, or some of them, and so that said books and papers shall come to the possession of the officers of said county, they will pay for the same and for the return of said books and papers the sum of thirty-five hundred dollars to said persons.

5 "It is hereby agreed that the said supervisors and the treasurer shall deposit in the hands of Mess'rs Eldridge & Tourtelotte the said sum of money (which sum is hereby deposited with said Eldridge & Tourtelotte), and which said sum shall be held by them until said books and papers shall be returned to said county, and when so delivered to said county the said sum of money so deposited in said Eldridge & Tourtelotte's hands shall be paid and delivered to said parties so causing said books and papers to be so returned to said county, and in case the said books and papers to be so returned to said county, and all of them, are not delivered to said county on or before the 12th day of September, A. D. 1872, then the said moneys so received by said Eldridge & Tourtelotte shall be returned to and given back to said treasurer of said county.

"Chicago, September 6th, A. D. 1872.

(Signed) "W'M M. WATKINS,

"*Comm. of Board of Supervisors for the County of S't Joseph.*

"JAMES HILL,

"*County Treasurer.*

"E. F. PEIRCE,

"*County Sheriff.*

"H. N. ELDRIDGE.

"F. W. TOURTELOTTE."

"I hereby guarantee the faithful performance of the above agreement on the part of said Eldridge & Tourtelotte.

"MANCEL TALCOTT."

"It is understood that any failure to deliver some small paper or papers shall not invalidate the above agreement.

"W'M M. WATKINS, County."

And the said plaintiff avers that he, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on the 6th day of September, A. D. 1872, at the city of Chicago, in

6 the State of Illinois, deposit in the hands of the said Hamilton N. Eldridge and Frederick W. Tourtelotte the said sum of thirty-five hundred dollars, under the conditions of said contract; that although the time specified in the contract hereinbefore set forth, in which the said books and papers were to be returned to said county, has long since elapsed, yet the said books and papers, or any part of them, have not been delivered to said county by the said defendants, or others acting under or through them, of all which said premises the said defendants afterwards, to wit, on the 21st day of September, A. D. 1872, at the city of Chicago last aforesaid, had notice; yet the said defendants, not regarding their said promise or undertaking, but contriving and craftily

and subtly intending to deceive and defraud the said plaintiff and the said county of S't Joseph in this behalf, has not as yet, although often afterwards requested so to do by said plaintiff, returned or given to the said plaintiff, treasurer of the county of S't Joseph aforesaid, the amount of thirty five hundred dollars, deposited in their hands under and by virtue of the contract hereinbefore set forth, or any part thereof; but hath hitherto wholly neglected and refused so to do, and still doth neglect and refuse so to do, to the damage of the plaintiff of five thousand dollars, and therefore he brings suit.

And, also, for that whereas, heretofore, and before the making of the promise and undertaking of the defendants in writing hereinafter next set forth, and on the 28th day of June, A. D. 1872, there was stolen from the office of the register of deeds of the county of S't Joseph aforesaid, among others, the following books and papers, that is to say, volumes C, E, F, and G, and numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 54 of deeds; volumes A, B, and C, and numbers 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 24 of mortgages; volume 1 of levys, and volume 1 of lis pendens, four volumes of entry books, one book of attachments, and a large number of other books and papers, the records and files of said county, of which said books and papers no definite clue could be ascertained tending to lead to their discovery or recovery until the 6th day of September, A. D. 1872, when the said defendants herein, professing their ability to successfully search and negotiate
7 for and procure the return of all and singular the said books and papers, entered into a contract in writing to procure the return of said books and papers, each and every one thereof, in as good condition as when taken away, in a certain time therein stated, for a certain consideration therein stated, to be deposited with the said defendants, and in case the said contract should not be performed on the part of the said defendants, then said consideration so deposited to be returned to the plaintiff herein, which said contract was and is in the words and figures following, that is to say:

Whereas there was lost from the office of the register of deeds of the county of S't Joseph, and State of Michigan, on the night of the 28th day of June, A. D. 1872, among other, the following books and papers, to wit: volumes C, E, F, G, and H, and numbers 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 54 of deeds; volumes A, B, and C, numbers 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, and 24 of mortgages; volume 1 of levys, and volume 1 of lis pendens, four volumes of entry-books, one book of attachments, besides a large number of other books and papers; and whereas the supervisors of said county are anxious to obtain possession of all of said lost books and papers; and whereas certain parties have been engaged for some time in endeavoring to get said books and papers for said supervisors: Now, therefore, the said supervisors have agreed, and do hereby agree, that in case all said books and papers so taken from said office of said register at said time shall be returned to said county and to said supervisors, or some of them, so that said books and papers shall come to the possession of the officers of said county, they will pay for the same and for the return of said books and papers the sum of thirty-five hundred dollars to said persons.

It is hereby agreed that the said supervisors and the treasurer shall deposit in the hands of Mess'rs Eldridge & Tourtelotte the said sum of money (which sum is hereby deposited with said Eldridge & Tourtelotte), and which said sum shall be held by them until said books and papers shall be returned to said county; and when so delivered to said
8 county, the said sum of money so deposited in said Eldridge &

Tourtelotte's hands shall be paid and delivered to said parties so causing said books and papers to be so returned to said county; and in case the said books and papers, and all of them, are not delivered to said county on or before the 12th day of September, A. D. 1872, then the said money so received by the said Eldridge & Tourtelotte shall be returned to and given back to the said treasurer of said county.

Chicago, September 6th, A. D. 1872.

(Signed) W'M M. WATKINS,
Committee of Board of Supervisors for the County of S't Joseph.
JAMES HILL,
County Treasurer.
E. F. PIERCE,
County Sheriff.
H. N. ELDRIDGE.
F. W. TOURTELOTTE.

I hereby guarantee the faithful performance of the above agreement on the part of said Eldridge & Tourtelotte.

MANCEL TALCOTT.

It is understood that some failure to deliver some small paper or papers shall not invalidate the above agreement.

W'M M. WATKINS, County.

And the said plaintiff avers that he, confiding in said promise and undertaking of the said defendants, did afterwards, to wit, on the 6th day of September, A. D. 1872, at the city of Chicago, in the State of Illinois, deposit in the hands of the said Hamilton N. Eldridge and Frederick W. Tourtelotte, partners as aforesaid, defendants herein, the said sum of thirty-five hundred dollars, under the conditions of said contract; that, although the time specified in said contract hereinbefore set forth in which said books and papers were to be delivered in good condition, as aforesaid, has long since elasped, yet the said books or papers, 9 or any part of them, have not been delivered to the said county of S't Joseph by the said defendants, or other parties referred to in said contract set forth, acting through or by the said defendants, as by the said defendants it is now claimed has been done; and the plaintiff avers that the said defendants, acting through parties unknown to the plaintiff, if they acted at all, instead of performing the conditions of said contract, well knowing the whereabouts of said books and papers, wantonly and wilfully abandoned them, to wit, on the 7th day of September, A. D. 1872, in and by a pit dug in the woods or open fields in the township of Lockport, in the county of S't Joseph aforesaid, exposed to the weather, without any covering or protection, and which, when discovered, said books and papers were greatly damaged and rendered thereby in many places illegible, and to such great extent as to render the copying of a large number thereof, to wit, twenty volumes, absolutely necessary, at great expense, to wit:

County, to wit, thirty-five hundred dollars, and many of the papers were totally destroyed, to the great damage of the county of S't Joseph aforesaid; that in such exposed and damaged condition the said books and papers were found and restored to the county of S't Joseph by other than the said defendants or those connected with them; which said county then and there refused to receive the same as a compliance of said defendants with their said contract, of all which said premises the said defendants afterwards, to wit, on the 21st day of September

A. D. 1872, at the city of Chicago, last aforesaid, had notice, and thereupon they, the said defendants, not regarding their said promises and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff and said county of S't Joseph, refused and now refuse to repair, make good, or account for the great damage, to wit, books and papers, aforesaid, or to refund to said plaintiff or to said county of S't Joseph, the sum of thirty-five hundred dollars aforesaid; and, although the said plaintiff has faithfully performed each and every condition required of him in and by said agreement or contract, yet the said defendants have not, although often requested so to do, returned or given to the said plaintiff, treasurer of the county of S't Joseph aforesaid, the amount deposited in their hands under and by
10 virtue of the contract hereinbefore set forth, to wit, the sum of thirty-five hundred dollars, or any part thereof, but have hitherto wholly neglected and refused, and still doth neglect so to do, to the damage of the plaintiff of five thousand dollars, and therefore he brings suit. And, also, for that whereas the said defendants at Centerville, in the county of S't Joseph aforesaid, on the 21st day of September, A. D. 1872, was indebted to the plaintiff in the sum of five thousand dollars for money then and there lent by the plaintiff to the defendants at their special request, and in a like sum for money then and there received by the defendants for the use of the plaintiff, and in a like sum for money then and there found to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants afterwards, and on the day and year last aforesaid, in consideration of the premises respectively then and there promised the plaintiff to pay him the said several sums of money respectively on request; yet the said defendants have disregarded their said promises and have not (although often requested so to do) paid any of the said sums of money, or any part thereof, to the plaintiff's damage of five thousand dollars, and therefore he brings suit.

TALCOTT C. CARPENTER,
Attorney for Plaintiff and Prosecuting Attorney.

STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
FREDERICK W. TOURTELOTTE, IMPLEADED with Hamilton N. Eldridge.

And the said Frederick W. Tourtelotte, by Ball and Wolcott,
11 his attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

BALL & WOLCOTT,
Attorneys for Defendant Frederick W. Tourtelotte.

SIR: Please to take notice that on the trial of this cause the above named defendant will give in evidence, under the general issue above pleaded, and insist in his defence, that if he received the sum of thirty-five hundred dollars from and entered into an agreement to deliver cer-

tain books and papers to the county of S't Joseph, in the State of Michigan, or some of the officers thereof, as the said plaintiff has alleged in his said declaration (which this defendant does not admit, but herein expressly denies), he paid out and expended the said sum of thirty-five hundred dollars upon the delivery to him of an acknowledgment in writing of the agents or sheriff of said county, or some of the officers thereof; that the said books and papers in said declaration mentioned had been by them, or some of them, received, in accordance with said agreement; and that if said books and papers were not received by the said county of S't Joseph, or by some of the officers thereof, and if said money was improperly paid out and expended by said defendant, the agents of said county, or some of the officers thereof, deceived this defendant and caused said payment by their wilful misconduct, misfeasance, neglect, and omission in the performance of their duty; and that by reason thereof said defendant is not liable for the repayment of the said sum of thirty-five hundred dollars, or of any sum whatever.

Yours, &c.,

BALL & WOLCOTT,
Attorneys for Defendant Frederick W. Tourtelotte.

Dated Grand Rapids, February 10th, A. D. 1873.

To T. C. CARPENTER, Esq.,
Attorney for Plaintiff and Prosecuting Attorney.

12 The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

In the above-entitled cause the said defendant H. N. Eldridge not having been served with process, it is ordered by Ball & Wolcott, the attorneys for said defendant, that the appearance of the said defendant Hamilton N. Eldridge be, and the same is hereby, entered, and service of process upon said defendant be, and the same is hereby, waived.

BALL & WOLCOTT,
Attorneys for said Defendant Eldridge.

MARCH 19th, 1873.

STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER, &C.,
vs.
HAMILTON N. ELDRIDGE ET AL.
} Stipulation, March 19th, 1873.

It is hereby stipulated in the above-entitled cause that Edwin W. Keightley be substituted as attorney for the plaintiff in the place and stead of T. C. Carpenter.

T. C. CARPENTER,
Plaintiff's Attorney.
EDWIN W. KEIGHTLEY,
BALL & WOLCOTT,
Attorneys for Defendants.

13 STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

And now comes the said defendants, by Ball & Wolcott, their attorneys, and move the court now here to make an order transferring this cause to the circuit court of the United States for the sixth circuit and western district of Michigan, and to proceed no further in said cause, for the reason that at the time of the beginning of this suit the plaintiff was and is a resident of the State of Michigan, and that the defendants at the time aforesaid were and now are residents and citizens of the State of Illinois.

And for the further reason that the defendants, from prejudice and local influence, will not be able to obtain justice in this court.

That defendants have caused their petition, affidavit, and bond to be filed herein, setting forth the facts and praying for the removal of said cause, etc., which said motion is based upon the records and files in this cause, and upon the petition, affidavit, and bond hereinbefore referred to.

BALL & WOLCOTT,
Attorneys for Defendants.

Dated Centreville, March 19th, A. D. 1873.

14 STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

GENTS: Please to take notice that we have this day duly entered a special motion in this cause, in the special-motion book, asking the court to make an order transferring this cause to the circuit court of the United States for the sixth circuit and western district of Michigan; that said motion is based upon the records and files herein, and upon a petition and affidavit and bond duly filed herein, copies of which are hereto annexed.

BALL & WOLCOTT,
Attorneys for Defendants.

To EDWIN W. KEIGHTLEY,
Attorney for the Plaintiff.

STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

Hamilton N. Eldridge and Frederick W. Tourtelotte, of the city of Chicago, Cook County, and State of Illinois, being both duly
15 sworn, severally depose and say that they are the defendants in the above-entitled suit; that said above-entitled cause was commenced against the above-named defendants in said above-named court on the 22d day of November, A. D. 1872; that no final hearing or trial has been had, and that it is now pending in said court; that the said above suit was commenced by the said plaintiff against the said defendants for the recovery of the sum of thirty-five hundred dollars, which said money the said plaintiff claims is in the hands of the defendants, and to which he claims he is entitled for the use and benefit of said county of S't Joseph, State of Michigan. That the said James Hill is a citizen of the State of Michigan, residing in the county of S't Joseph, in said State, and so was a resident of said county and a citizen of said State at the time of the commencement of the above suit.

That the said county of S't Joseph, for whose use and benefit the said James Hill, treasurer, has sued, is a county in the State of Michigan, and so was at the commencement of this suit.

That both of these affiants—Hamilton N. Eldridge and Frederick W. Tourtelotte—are citizens of the State of Illinois and residents of the city of Chicago, county of Cook and State of Illinois, and so were citizens of said State and residents of said county of Cook at the time of the commencement of this suit, and that neither of these affiants are or ever were citizens or residents of the State of Michigan.

That the amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs. That these affiants both swear and state that they have reason to and do believe that, from prejudice and local influence, they will not be able to obtain justice in said circuit court for said county of S't Joseph, in said State of Michigan. That this affidavit is made for the purpose of procuring a removal of said suit from said circuit court of said S't Joseph County to the circuit court of the United States for the sixth circuit and western district of Michigan at the next term thereof.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

16 STATE OF ILLINOIS,
Cook County, ss:

Hamilton N. Eldridge and Frederick W. Tourtelotte, being duly sworn, depose and say that they are the affiants who made the above affidavit, and that they signed the same, and that the facts set forth in said foregoing affidavit are true, and that said affiants are the defendants in the above-entitled suit.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

Subscribed and sworn to before me this 17th day of March, A. D. 1873.
[SEAL.] SIMEON W. KING,
A Commissioner for the State of Michigan, residing at Chicago, in Illinois.

STATE OF MICHIGAN:

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

To the circuit court for the county of S't Joseph:

Your petitioners, Hamilton N. Eldridge and Frederick W. Tourtelotte, citizens of the State of Illinois, and residents of the city of Chicago, Cook County, State of Illinois, respectfully represent and show that at the time of the commencement of this suit they were and now are both citizens and residents of the State of Illinois. That your petitioners are defendants in a suit commenced by James H. Hill, treasurer, etc., and who sues for the use and benefit of S't Joseph County, in the State of Michigan, plaintiff, against your petitioners as defendants, summoned to answer under the name of H. N. Eldridge and F. W. Tourtelotte, composing the firm of Eldridge & Tourtelotte, in the circuit court for the county of S't Joseph, in the State of Michigan.

17

And your petitioners respectfully show that the said James Hill, plaintiff, was treasurer of said county of S't Joseph, in said State of Michigan, and for whose use he sues in said action at the time of the commencement of this suit.

That the said James Hill is now and was at the time of the commencement of this suit a citizen of the State of Michigan and a resident of said county of S't Joseph.

Your petitioners further show that the said suit was commenced for the recovery of the sum of thirty-five hundred dollars, which the said plaintiff claims is in the hands of your petitioners, and that they are justly indebted to said plaintiff in that sum; that the said suit is now pending and undetermined in said circuit court for the county of S't Joseph, and that no final hearing or trial thereof has been had on the same. That the amount in controversy in said suit exceeds the sum of five hundred dollars, exclusive of costs.

Your petitioners further state and swear that they have reason to and do believe that, from prejudice and local influence, they will not be able to obtain justice in said circuit court of said county of S't Joseph, in said State of Michigan.

And your petitioners further show that they have made and file herewith in said cause their affidavit, which is in the words and figures following, to wit:

18

The circuit court for the county of S't Joseph.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

Hamilton N. Eldridge and Frederick W. Tourtelotte, of the city of

Chicago, Cook County, State of Illinois, being both duly sworn, severally depose and say that they are the defendants in the above-entitled suit; that said above-entitled cause was commenced against the above-named defendants in said above-named court on the 22d day of November, A. D. 1872; that no final hearing or trial has been had, and that it is now pending in said court; that said above suit was commenced by the said plaintiff against the said defendants for the recovery of the sum of thirty-five hundred dollars, which said money the said plaintiff claims is in the hands of the defendants, and to which he claims he is entitled, for the use and benefit of said county of S't Joseph, State of Michigan.

That said James Hill is a citizen of the State of Michigan, residing in the county of S't Joseph, in said State, and so was a resident of said county, a citizen of said State, at the time of the commencement of above suit.

That the said county of S't Joseph, for whose use and benefit the said James Hill, as treasurer, has sued, is a county in the State of Michigan, and so was at the time of the commencement of this suit.

That both of these affiants, Hamilton N. Eldridge and Frederick W. Tourtelotte, are citizens of the State of Illinois, and residents of the city of Chicago, county of Cook, and State of Illinois, and so were citizens of said State and residents of said county of Cook at the time of the commencement of said suit; and that neither of these affiants are or ever were citizens or residents of the State of Michigan.

19 That the amount in controversy in this suit exceeds the sum of five hundred dollars, exclusive of costs.

That these affiants both swear and state that they have reason to and do believe that, from prejudice and local influence, they will not be able to obtain justice in said circuit court for said county of S't Joseph, in said State of Michigan.

That this affidavit is made for the purpose of procuring a removal of said suit from said circuit court of said S't Joseph County to the circuit court of the United States for the sixth circuit and western district of Michigan, at the next term thereof.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

STATE OF ILLINOIS,
Cook County:

Hamilton N. Eldridge and Frederick W. Tourtelotte, being duly sworn, depose and say that they are the affiants who made the above affidavit, and that they signed the same, and that the facts set forth in said foregoing affidavit are true, and that said affiants are the defendants in the above-entitled suit.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

Subscribed and sworn to before me this 17th day of March, A. D 1873.

[SEAL.]

SIMEON W. KING,
A Commissioner of the State of Michigan, residing at Chicago, in Illinois.

Which said copy your petitioners make a part hereof.

And your petitioners so being duly sworn, offer good and sufficient security for entering at the next term of the circuit court 20 of the United States in and for the sixth circuit and western dis-

trict of Michigan, and on the first day thereof, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as by the statute are required to be done in the removal of a suit in the State courts into a court of the United States; and herewith present to the court their bond, with Byron D. Ball and Harvey J. Hollister, of the city of Grand Rapids, in the State of Michigan, as security thereto, in the penal sum of five hundred dollars, conditional to be void only in case your petitioners do and perform all acts and things required of them as aforesaid, and hereby ask the court to accept the same and such security.

Therefore, your petitioners pray for the removal of said suit to the said circuit court of the United States, for the sixth circuit and western district of Michigan, and at the next term thereof, and on the first day thereof, under and by the statutes and laws of the United States in such cases made and provided, and that the court will proceed no further with it.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

STATE OF ILLINOIS,
Cook County:

Hamilton N. Eldridge and Frederick W. Tourtelotte, being both duly sworn, depose and say that they are the petitioners mentioned in the above suit and the defendants therein mentioned, and that they signed the foregoing petition, and that the matters and thing' therein stated are true.

HAMILTON N. ELDRIDGE.
FREDERICK W. TOURTELOTTE.

21 Subscribed and sworn to before me this 17th day of March, A. D. 1873.

[SEAL.]

SIMEON W. KING,
A Commissioner for the State of Michigan, residing in Chicago, in Illinois.

Know all men by these presents that we, Hamilton N. Eldridge and Frederick W. Tourtelotte, of the city of Chicago, county of Cook, and State of Illinois, as principals, and Byron D. Ball and Harvey J. Hollister, of the city of Grand Rapids, county of Kent, and State of Michigan, as sureties, are jointly and severally held and firmly bound unto James Hill, treasurer of the county of St. Joseph, in the penal sum of five hundred dollars, for which well and truly to be paid unto the person aforesaid, his successors, administrators, and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents, sealed with our seals this 15th day of March, A. D. 1873.

The conditions of this obligation is such that if the said Hamilton N. Eldredge and Frederick W. Tourtelotte, the defendants in a suit now pending in the circuit court for the county of S't Joseph, State of Michgan, wherein James Hill, treasurer of the county of S't Joseph, for the use and benefit of said county, is plaintiff, shall forthwith and during the present term, or on the first day of the next session or term of the circuit court of the United States for the sixth circuit and western district of Michigan, enter copies of the process in the said suit against said defendants, and of all proceedings, pleadings, and papers in said circuit court for the county of S't Joseph relating to said cause, and shall enter the appearance of said defendants in said circuit court of the

United States for the district aforesaid, and shall enter special bail in the cause if special bail was originally required, then this obligation to be void, otherwise to remain in full force and effect.

22 In virtue whereof the said obligees have hereunto set their hands and seals this 15th day of March, A. D. 1873.

HAMILTON N. ELDRIDGE. [SEAL.]
FREDERICK W. TOURTELOTTE. [SEAL.]
BYRON D. BALL. [SEAL.]
HARVEY J. HOLLISTER. [SEAL.]

STATE OF MICHIGAN,
County of Kent, ss:

Byron D. Ball and Harvey J. Hollister, the sureties in the foregoing obligation named, being duly sworn, severally depose and say that they are residents of the city of Grand Rapids and State of Michigan, and are householders therein, and are severally worth the sum of five thousand dollars, over and above all their and each of their just debts and liabilities, and exclusive of all property exempt by law from execution.

BYRON D. BALL.
HARVEY J. HOLLISTER.

Subscribed and sworn to before me this 15th day of March, A. D. 1873.

CHARLES G. GODFROY,
Notary Public, Kent County, Mich.

Regular session of the circuit court for the county of S't Joseph and State of Michigan, continued and held at the court-house in the village of Centreville, on the 19th day of March, A. D. 1873.

Present, Hon. Henry H. Coolidge, circuit judge.

23 The court opened for business in due form.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte.

Upon reading and filing the petition of the above-named Hamilton N. Eldridge and Frederick W. Tourtelotte, defendants herein, for the removal of this suit into the circuit court of the United States for the sixth circuit and western district of Michigan, in pursuance of the laws of the United States relating to the removal of suits from State courts, and upon filing the security offered by the said defendants according to the requirements of said laws, and on motion of Ball & Wolcott, attorneys for said defendants, it is hereby entered that the said security be accepted, and the said suit be removed into the said circuit court of the United States, to be held in the said western district of Michigan, and that no further proceedings be had in said suit in this court.

(Signed) HENRY H. COOLIDGE,
Circuit Judge.

STATE OF MICHIGAN,
County of S't Joseph, ss:

I, John C. Joss, clerk of the circuit court for the county and State aforesaid, do hereby certify that I have compared the foregoing transcript of order with the original on file and of record in my office, and that the same is a true and correct transcript of the whole of such original record order.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at Centreville, this 19th day of March, A. D. 1873.

[SEAL.] JOHN C. JOSS, *Clerk.*

24 STATE OF MICHIGAN,
S't Joseph County, ss:

I, John C. Joss, clerk of the circuit court for said county, do hereby certify that the annexed and foregoing is a true and compared copy of the declaration, plea, and of all other papers, rules, or orders in the case wherein James Hill, treasurer of the county of S't Joseph, for the use and benefit of said county, is plaintiff, and Hamilton N. Eldridge and Frederick W. Tourtelotte are defendants, and of the whole thereof, as the same appears of record and on file in my office.

Witness my hand and seal of said court at Centreville this 23d day of April, A. D. 1873.

[SEAL.] JOHN C. JOSS,
Clerk as aforesaid.

UNITED STATES OF AMERICA.

The circuit court of the United States for the sixth circuit and western district of Michigan.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county,
vs.
FREDERICK W. TOURTELOTTE, IMPLEADED with Hamilton N. Eldridge.

Whereas the appearance of the defendant Hamilton N. Eldridge was entered herein after the filing of a plea in said cause on behalf of said defendant Tourtelotte, and hitherto no plea to the declaration in said cause has been filed on his behalf, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the said plea may be taken and considered as also filed by and in be-
25 half of the said defendant Hamilton N. Eldridge, and the filing of any other or separate plea on his behalf and the service of a copy thereof is hereby waived.

E. W. KEIGHTLY,
Attorney for Plaintiff,
By W. L. STOUGHTON,
Of Counsel.
BALL & WOLCOTT,
Attorneys for Defendants.

This stipulation is filed without prejudice to trial of said cause at present term of said court.

BALL & WOLCOTT,
Attorneys for Defendants.

UNITED STATES OF AMERICA:

The circuit court of the United States for the sixth circuit and western district of Michigan.

JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county, plaintiff,
vs.
HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte, defendants.

Afterwards, to wit, at a session of said court held at the court-rooms, in the city of Grand Rapids, in the western district of Michigan, on the ninth of December, in the year one thousand eight hundred and seventy-four, before the honorable Solomon L. Withey, district judge, appointed to hold the said circuit court of the United States, according to the form of the statute in such case made and provided, the aforesaid issue, so joined between the parties aforesaid, came on to tried by a jury of the said western district of Michigan, for that purpose duly empanelled, good and lawful men of the said district.

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At which day there came as well the said plaintiff as the said defendant, by their attorneys aforesaid.

And the jurors of the said jury empanelled to try the said issue, being called also, came, and were then in due manner chosen and sworn to try the said issue.

And upon the trial of that issue the counsel for the plaintiff, to maintain and prove the said issue on his part, gave in evidence that on or about the night of the 28th day of June, in the year 1872, there was stolen from the office of the register of deeds in and for the county of S't Joseph and State of Michigan certain books of records of deeds, mortgages, &c., relating to the titles of the lands situated in said S't Joseph County, and also a large number of deeds, mortgages, and other papers left in the office of the said register of deeds to be recorded in the books of record of his said office; that after the said books were so stolen and carried away, the officers of said county made sundry efforts to find and recover the same; all of which efforts were fruitless and unavailing, up to about the 5th day of September, 1872.

And the counsel for the said plaintiff, to further maintain and prove the said issue upon his part, offered evidence to prove that on the 5th day of September, 1872, the said plaintiff, together with certain other of the officers of S't Joseph County, acting on behalf of said county, made a certain agreement or contract in writing with the said defendants, which contract or agreement was in words and figures as follows, to wit:

Whereas there was lost from the office of the register of deeds of the county of S't Joseph, in the State of Michigan, on the night of the 28th day of June, A. D. 1872, among others the following books and papers, to wit: Volumes C, E, F, G, and H, and Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 54 of deeds; volumes A, B, and C, Nos. 4, 5, 6, 7, 8, 9, 10, 13, 14, 16, 17, 18, 19, 20, 22, and 24 of mortgages; volume 1 of levys, and volume 1 of lis pendens, 4 volumes of entry books, 1 book of attachments, besides a large number of other books and papers; and whereas the supervisors of said county are anxious to obtain possession of all of said lost books and papers; and whereas certain persons have been engaged for some time endeavoring to get said books and papers for said supervisors; now, therefore, the said supervisors

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have agreed and do hereby agree that in case all of said books and paperp so taken from said office of said register at said time shall be returned to said county and to said supervisors or some of them, and so that said books and papers shall come to the possession of the officers of said county, they will pay for the same and for the return of said books and papers the sum of thirty-five hundred dollars to said persons.

It is hereby agreed that the said supervisors and the treasurer shall deposit in the hands of Mess'rs Eldridge & Tourtelotte the said sum of money (which sum is hereby deposited with said Eldridge and Tourtelotte), and which said sum shall be held by them until the said books and papers shall be returned to said county, and when so delivered to said county the said sum of money so deposited in said Eldridge & Tourtelotte's hands shall be paid and delivered to said parties so causing said books and papers to be so returned to said county, and in case the said books and papers, and all of them, are not delivered to said county on or before the 12th day of September, A. D. 1872, then the said sum of money so received by said Eldridge & Tourtelotte shall be returned to and given back to said treasurer of said county.

Chicago, September 5th, A. D. 1872.

(Signed) W'M M. WATKINS,
Comm. of Board of Supervisors for the County of S't Joseph.
JAMES HILL,
County Treasurer.
E. F. PEIRCE,
County Sheriff.
ELDRIDGE & TOURTELOTTE.

28 It is understood that any failure to deliver some small paper or papers shall not invalidate the above agreement.
(Signed) W'M M. WATKINS.

And the said counsel for the said plaintiff then produced and proved the execution of and offered in evidence the said contract or agreement in writing; but to the introduction of evidence of the execution of said contract, and to the reading of the same in evidence, the said counsel for the said defendants did then and there object, because the said contract was not the contract set forth and declared upon by the said plaintiff in his declaration, and the same was immaterial and irrelevant.

But the said district judge did then and there declare and deliver his opinion, that the said objection so taken by the said counsel for the said defendant, as aforesaid, ought not to be allowed, but that the said contract or agreement in writing ought to be proved and admitted in evidence, and did accordingly decide that the same should be read in evidence on the part of the said plaintiff; to which said decision and opinion of the said judge the said counsel for the said defendants did then and there, on behalf of the said defendants, except.

And the said counsel for the said plaintiff did then read the said contract or agreement in writing in evidence; and did further give in evidence that, at the time and place of the making and execution of the said contract in writing, the said officers of said county of S't Joseph delivered to the said defendants the sum of thirty-five hundred dollars, lawful money of the United States.

That afterwards, and during the night of the 6th and 7th of Septem-

ber aforesaid, the said books and papers, which had been lost from the office of the register of deeds of S't Joseph County, as aforesaid, were pointed out to one Winslow W. Hatch, a deputy sheriff of the county of S't Joseph, at the side of a pit dug in the woods, about one mile from the village of Three Rivers, in S't Joseph County aforesaid,
29 by a stranger, who requested the said Hatch to receipt to him for the said books and papers; which the said Hatch, at the time and place last aforesaid, did.

That the said Hatch immediately thereafter returned to the village of Three Rivers, and aroused William M. Watkins, a supervisor of said county, and E. F. Pierce, the sheriff of said county, and returned with them, with a wagon, and took the said books and papers and carried them to the court-house of the said county, at the village of Centerville, in said county, at which place they arrived between the hours of twelve and two of the night of said 6th and 7th of September. The books and papers were then examined; the leaves generally were found to be saturated with water, and the books in a badly damaged condition.

The register of deeds of the county now took charge of them, and, in connection with employed assistants, had the leaves opened and interleaved with blotting pads and papers, and turned until dried. Then the books and papers were removed to the office of the register of deeds, where they remained. Nothing was done, except as aforesaid, tending to show that the officers of the county accepted the books and papers as a compliance with the contract of defendants.

That, upon examination, all of the papers which had been lost from the office of the said register of deeds of said county were found to be returned, excepting one deed and two powers of attorney; that the whole of the books that had been stolen from the said office of said register of deeds, viz, forty-four books of records, were returned to the custody of said register; that from one of said books one leaf, and from another of said books three leaves were missing; that the covers of several of said books were damaged by exposure to such extent as to render them worthless; that portions of some other leaves were lacking, and in some of the books a large number of parts of pages were gone, several pages illegible, the writing so far defaced as not to be capable of being transcribed; that it had been deemed necessary by the county officials to cause several of said books to be transcribed, which had accordingly been done.

30 That immediately upon ascertaining the damaged condition of the books, the said E. F. Pierce proceeded from the said village of Centerville to the said village of Three Rivers, and arrived there about four o'clock on the morning of the 7th of September, the train for the west then being at that place, and he at once sent a dispatch to the defendants, reading as follows: "Hold money. Will come on first train." He then took the train for Chicago, and arrived there about 10 a. m. of that day. He soon after went down to the office of the defendants, but did not find them in. After dinner he went down again, and found the defendant Tourtelotte in, who said, upon inquiry by Pierce, that he did receive the dispatch after he returned from court, about noon, but that he had paid over the money at about 8 o'clock a. m., at his office, to a man by the name of Wilson, who presented the receipt of W. W. Hatch, hereinafter set forth.

Plaintiff gave evidence tending to show that the defendant Tourtelotte resided about one and a half miles from his office; that the said Pierce remonstrated with him for being in such haste to pay over the money.

The said Tourtelotte, in reply, said there was no haste about it; that

he had paid over the money upon presentation of a receipt signed by deputy sheriff W. W. Hatch, which he presented and showed to said Pierce, and he told said Pierce that his remonstrance came too late to be of any service; whereupon angry words passed between them, and defendant Tourtelotte finally ordered the said Pierce out of his office.

And thereupon the counsel for the said defendants, to maintain and prove the said issue upon their part, gave in evidence that on the morning of the 7th day of September aforesaid, the defendant Tourtelotte arrived at his office at his usual hour, which was about half past seven o'clock; that upon his arrival he found one Wilson, a detective, who was known to defendant to have been engaged in the search for said books and papers, with the view to obtaining the reward deposited with
31 defendants to be paid for the return of said books and papers, awaiting him; and that Wilson then demanded that the said sum of money be paid to him, saying that the books had been returned, and at the same time producing a receipt in writing, which was and is in words and figures as follows, to wit:

"I have received from somebody 44 books, for S't Joseph County; also, papers and small index-books.

(Signed) "W. W. HATCH."

And that thereupon the said defendant paid to said Wilson the sum of thirty-five hundred dollars; that about nine o'clock a. m. said defendant Tourtelotte left his office and went to court, and did not return from court until noon; that during the same time defendant Eldridge was also absent from his office; that during the time when both of the defendants were so absent from their office, the telegram hereinbefore referred to was delivered at the office of the defendants, but remained unopened until the return of the defendant Tourtelotte from court, at about noon.

And thereupon the said district judge did then and there declare and deliver his opinion to the said jury, and did charge and instruct the said jury as follows:

"GENTLEMEN OF THE JURY: Forty-four volumes of the records of deeds and mortgages, including indexes and other books of record, together with a quantity of documents and papers, were stolen and lost from the office of the register of deeds of S't Joseph County, in this district, on the 28th day of June, 1872.

"The constituted authorities of the county were anxious, not alone for the capture and punishment of the thieves, but to obtain as well the return of those important records and documents, and finally, on the 5th day of September, were induced to believe that by payment of $3,500.00 to unknown paties the books and papers would be returned; and
32 to that end W'm M. Watkins, representing the board of supervisors; James Hill, county treasurer, and E. F. Pierce, sheriff of S't Joseph County, entered into a written agreement, which was also signed by defendants, and which has been read as part of the evidence. Let me say here that there was nothing unlawful in this agreement on either side. The substance and meaning of that agreement I will state: It recites the loss from the office of the register of deeds on the night of June 28th, 1872, of books and papers, giving the letter and number and names of the volumes, making forty-four volumes; that the supervisors of said county are anxious to obtain possession of all said lost books and papers, and that certain persons (not named) have been engaged for some time endeavoring to get said books and papers for said supervisors.

"Therefore said supervisors, by said officers of the county, agree that in case all said books and papers taken from said office shall be returnd to said county and to said supervisors, or some of them, and so that said books and papers shall come to the possession of the officers of said county, they will pay for the same and for their return the sum of $3,500 to said persons; that is, to the persons who had been engaged for some time endeavoring to get said books and papers for said supervisors, whoever they might be; i. e., that if the books and papers shall in any way be returned so that they come to the offices of the county, the county will pay for their return the sum named to the persons causing their return. Such is the legal effect and meaning of the language used. Next it is agreed that the supervisors and treasurer shall deposit in the hands of Eldridge and Tourtelotte, defendants, said sum of $3,500, and which is declared to be deposited with defendants until said books and papers should be returned to said county; but in case said books and papers and all of them should not be returned to the county on or before the 12th day of September, 1872, then the $3,500 were to be returned by said defendants to the treasurer of said county of S't Joseph.

"A clause is then added to the written agreement in these words: 'It is understood that any failure to deliver some small paper or
33 papers shall not invalidate the above agreement.'

"You will see by the terms of the agreement the defendants became the depositories of the sum of $3,500, and as such were to pay the money over to the persons engaged in getting the books and papers, and who should cause them to be returned to the county by the 12th of September, 1872; or if the books and papers were not by that time returned to the county, they were to return the $3,500 to the county treasurer.

"Such constituted all of the obligations assumed by the defendants under the contract.

"The plaintiff by his declaration must recover, if at all, by proof that the books and papers were not returned and delivered to the county by the 12th of September, 1872. The contract was made September 5th; the books and papers were by a stranger shown to Hatch, a deputy sheriff of S't Joseph County, on the night of September 7th. Hatch notified the sheriff, Pierce, and Watkins, the committee of the supervisors, and they then proceeded a mile or more to the place where the books and papers had been pointed out by the stranger to Hatch. They there found books of record, forty-four volumes, and a large number of deeds, mortgages, etc., papers that had been stolen with the records. These persons placed the records and papers in the wagon and conveyed them to the county seat of S't Joseph County, depositing them in the court-house, where they were examined and found to be in a damaged condition; some of the volumes so much damaged that they had to be copied to insure preservation of the records. The books had apparently been in a damp place, possibly buried in the earth or exposed to rain. By some means the leaves were wet, some of them rotted, defaced, and destroyed to an extent which had destroyed the record or writing of portions of several hundred pages. A small number of the leaves of one volume were wholly gone, or at least when copies of the most damaged volumes were made, some half-dozen leaves were gone; some few papers not found among those that reached the register's office. The books
34 and papers remained a few days at the court-house, in its halls, undergoing drying process and examination until finally the books and papers were removed to the office of the register of deeds of S't Joseph County. The question therefore is whether all the books and papers

were returned to the county, so that they came to the possession of the officers of said county within the meaning and intention of the arrangement and stipulations contained in the paper writing of September 5. You will remember the stipulation that failure to deliver some small paper or papers should not invalidate the agreement to pay on the part of the county.

"You are instructed that if the books and papers were so returned to S't Joseph County that they came to the possession of the officers of said county, the return was sufficient.

"It was not necessary that the unknown persons should convey and deposit the books and papers in the office of the register of deeds, nor was it necessary that they should deliver the books and papers directly into the hands or possession of the officers of the county, nor to any supervisor. It was sufficient if the unknown parties discovered the books and papers to the county officers and did that which caused them to be returned to those officers. This causing a return is accomplished by the doing of that which produced a return of the books and papers to the county officers. In other words, if, by what the unknown persons did, the books and papers got back to the proper custodian of and place in the county where they belonged, that will answer the terms and meaning of the stipulation, and would be a substantial return and entitle the unknown parties causing such substantial return to the $3,500. If the officers of the county or some of them found the books and returned them to the proper county officials and not from the action and information given by the unknown parties, then there was no such return as stipulated, and the $3,500 should have been paid back by defendants to the treasurer of the county. But it is said even if the unknown parties caused the return of so much of the books as were legible and remaining, still there was not a return of the books and all of every book, and
35 therefore defendants should have returned the money to the county. This presents a question partly for the court and partly for the jury."

To which last-mentioned opinion and charge of the said judge the said counsel for the said defendants did then and there, on behalf of the said defendants, except.

"The question for the court is to determine the rules by which you are to find the fact. You are instructed that whether the books were returned in view of their defective condition is to be determined by ascertaining whether substantially the county received that for which the officers agreed to pay $3,500. If so, there can be no recovery in this action; if not plaintiff is entitled to recover. No book was lacking, but there were absent leaves and parts of leaves; portions of pages were illegible or wholly obliterated in one or more of the books. Did this defective and incomplete condition render one or more of the books so far useless as to be no longer one of the records for which, among others, the reward was offered and agreed to be paid?"

To which last-mentioned opinion and charge of the said judge the said counsel for the said defendants did then and there, on behalf of the said defendants, except, upon the ground that there was no evidence upon which to base such finding.

"This might well be tested by determining whether those defective books were in a condition that substantially preserved to the county the contents of the records of the county land-titles. Practically, for all essential uses in determining titles to the lands of the county recorded in those volumes, did those books still remain the silent witnesses and adequate evidence of titles in that county? The court instructs you

that such the books should be when returned to justify the defendants parting with the money to the unknown parties causing their return. There was no stipulations or terms which required the books to be returned in the same or in as good condition as when lost. The fact that the volumes were damaged, soiled, wet, discolored, some torn
36 leaves, even illegible and absent parts, all this may not be conclusive; they are facts for you to consider in determining whether the records as returned were or were not essentially the records for which the reward was offered. I feel compelled to say to the jury that defendants are not to be regarded in determining the question of their liability as having any unlawful connection with any enterprise touching the books in question. They were simply depositories of the country's money, and so far the agents and bailees of the county as that if they faithfully executed that agency, they are as free from fault as are the officers of the county who entered into the agreement to pay the reward. Both parties acted in a laudable enterprise and for a legitimate object. Defendants were not to pay over the money to persons causing the return of the records unless the return was one of substantial compliance, and they acted at their peril if they paid without such substantial compliance. It seems they acted upon the evidence afforded by the receipt of Deputy Sheriff Hatch, and being informed by one Wilson, a detective, to whom the money was going, that the books were returned to the county officers. Hatch is not shown to have been authorized in behalf of the county to give an authoritative receipt for the books so as to bind the county; and if defendants acted upon information which was not reliable, it is their misfortune. They were bound to know before paying over the money that the books and papers had been delivered to the county within the true meaning of the agreement. Again, the court instructs you that, under the circumstances, the fact that the county officers received the books and papers in the condition they were in no way operates as a waiver of any legal rights to demand the return of the $3,500 from defendants if the books had not in fact been delivered within the meaning of the written agreement.

"As I have already explained that agreement, the records belong to the county, and its officers were not bound to refuse to accept them because of their damaged condition; and if they used reasonable diligence, as they undoubtedly did, in notifying the defendants of their views as to the books, the county is in no wise guilty of laches.

37 "You will remember the clause added to the written agreement, that 'failure' to deliver some small paper or papers should not invalidate the agreement. You will give force to this clause when saying whether substantially the county obtained its records and papers. It clearly means that any omission which is not essential and material to the records shall not defeat the reward.

"The court instructs you that defendants were under no obligation to await information from the officers of the county before paying the money over to the parties who caused the return of the books and papers.

"The only consideration which concerned the defendants before paying over the money was to have reliable information as to the facts of the return of the books and papers.

"They were not bound to wait longer than the reception of reliable information of such return—a return which would be a substantial compliance with the terms of the written agreement."

And the said district judge, under the charge and with the directions aforesaid, left the aforesaid issues and the evidence so given on the trial

aforesaid to the said jury, and the said jury then and there gave their verdict for the said plaintiff, and thirty-nine hundred and seventy-one and 91-100 dollars damages.

And afterwards a motion was duly filed in the said cause that said verdict be set aside and vacated, and that a new trial of said cause be granted for the following reasons:

I. That said verdict is unsupported by the whole evidence in said cause;

II. That said verdict is against the evidence exhibited in said cause;

III. That said verdict is against the instructions of the court given to said jury; and that

38 IV. The said jury erred in the application to the proven facts of said cause of the rules of law given to said jury by this court in its instructions. Which said motion was on the 19th day of December argued by counsel for the said plaintiff and the said defendants, and the said court did then and there overrule and deny the said motion; to which order and decision of the said judge the said counsel for the said defendants, on behalf of said defendants, did then and there except.

And thereupon judgment was entered in said cause for the said plaintiff and against the said defendants for thirty-nine hundred and seventy-one and 91-100 dollars damages, with his costs to be taxed; and the said counsel for the said defendants did then and there prepare their aforesaid exceptions to the rulings, opinion, and charge of the said district judge and request him to put his seal to this bill of exceptions according to the statute in such case made and provided, etc., etc.

S. L. WITHEY,
U. S. District Judge.

39 UNITED STATES OF AMERICA, *ss:*

To James Hill, treasurer, who sues for the use and benefit of the county of S't Joseph, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, persuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western district of Michigan, wherein Hamilton N. Eldridge and Frederick W. Tourtelotte are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Solomon L. Withey, judge of the circuit court of the United States for the said district, this twenty-fourth day of February, A. D. 1875.

S. L. WITHEY,
District Judge of the United States for the Western District of Michigan, Presiding.

I hereby accept due personal service of the within citation and of a true copy thereof.

March 25th, 1875.

EDWIN W. KEIGHTLEY,
Attorney for Plaintiff.

40 UNITED STATES OF AMERICA.

The Supreme Court of the United States.

HAMILTON N. ELDRIDGE AND FREDERICK W. Tourtelotte, plaintiffs in error,
vs.
JAMES HILL, TREASURER OF THE COUNTY OF S't Joseph, for the use and benefit of said county, defendant in error.

Assignments of error.

And now come the said plaintiffs in error, by Ball & Wolcott, their attorneys, and assign the following errors to the proceedings and judgment of the court below, viz:

First. The court erred in overruling the objection made by counsel for the defendant to the introduction of the said contract in evidence, and in admitting the same to be read in evidence, for the reason that the said contract is not the contract declared upon, and that the same is irrelevant and immaterial.

Second. That the said court erred in instructing the jury that the question whether or not the return of so much of the books in question as were legible and remaining was a return of the said books, and all of them, within the meaning of the contract in evidence, was question partly for the court and partly for the jury; for the reason that,
41 there being no conflict or dispute as to the condition of the said books, the question as to whether the facts proven constituted a substantial return of all of the said books within the meaning of the said contract, is a question of law for the court, and not a question of fact to be submitted to the jury.

Third. That the court erred in instructing the said jury that they were to find whether or not the condition of the said books was so far defective and incomplete, when returned to the officers of said county, as to render one or more of the books so far useless as to be no longer one of the records for which, among others, the reward was offered and agreed to be paid; for the reason that there was no evidence in the case upon which to base such a finding.

Fourth. That the court erred in overruling and denying the motion made for a new trial of the said cause.

BALL & WOLCOTT,
Attorneys for Plaintiffs in Error.

THE UNITED STATES OF AMERICA,
Western District of Michigan, ss:

I, Isaac H. Parrish, clerk of the circuit court of the United States for the said district, hereby certify that the foregoing is a true copy of the records and proceedings entered upon the journal and the proceedings of said court in said entitled cause.

Witness my official signature and the seal of said court, at Grand Rapids, this 2d day of October, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] ISAAC H. PARRISH,
Clerk.

42 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the (SEAL.) circuit court of the United States for the western district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between James Hill, treasurer, who sues for the use and benefit of the county of St. Joseph, plaintiff, and Hamilton N. Eldridge and Fred'rick W. Tourtelotte, defendants, a manifest error hath happened, to the great damage of the said Hamilton N. Eldridge and Fred'rick W. Tourtelotte, as by their complaint appears.

43 We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the United States of America, in the year of our Lord one thousand eight hundred and seventy five.

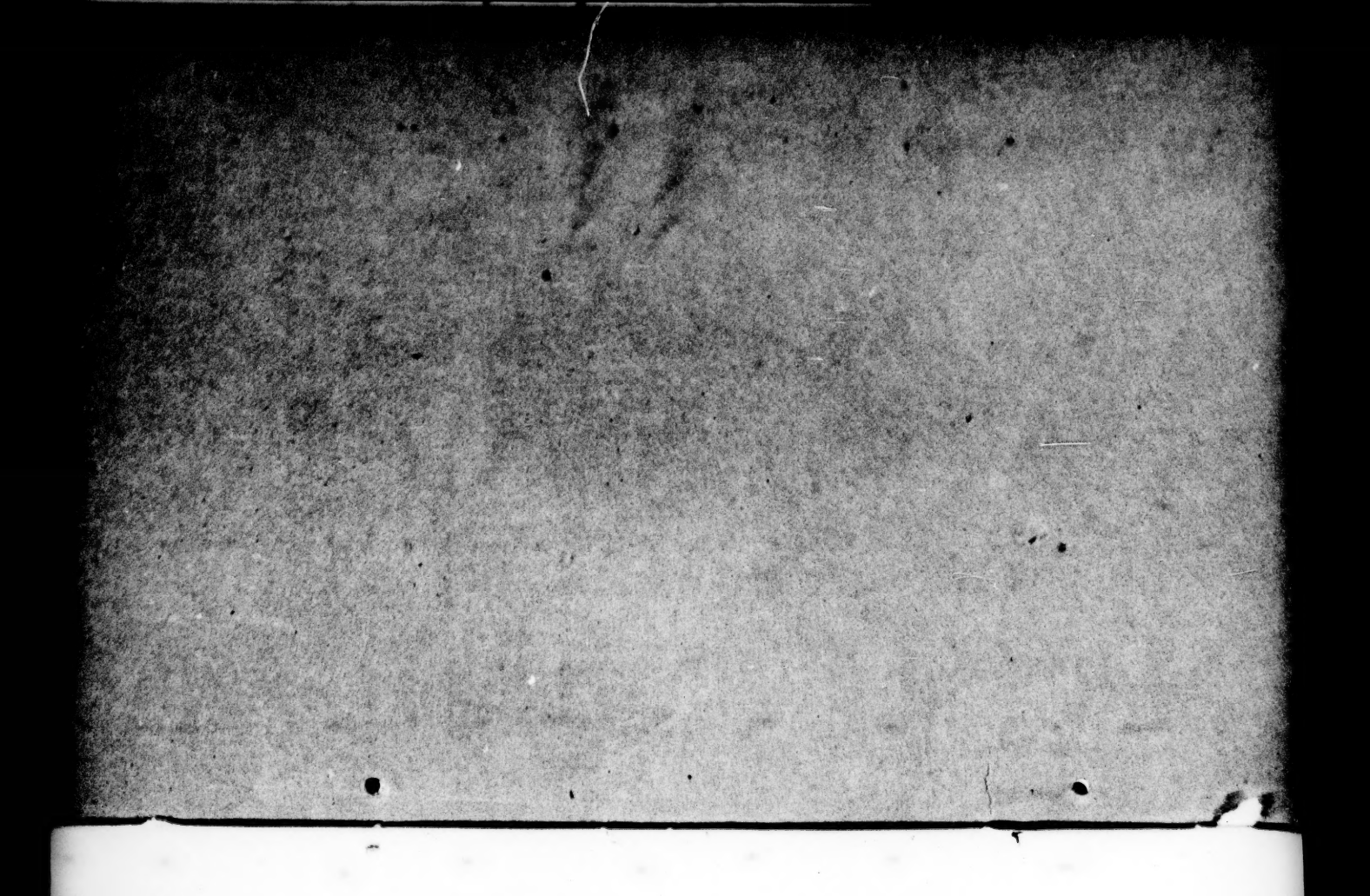
ISAAC H. PARRISH.
Clerk of the Circuit Court of the United States,
Western District of Michigan.

Allowed by—

S. L. WITHEY,
Dist. Judge.

Indorsed: 182. Circuit court of the United States for the west. dist. Mich. James Hill, treasurer, et al. vs. H. N. Eldridge et al. Bail & Wolcott, att'y' for def't.

Indorsement on cover: No. 251. Hamilton N. Eldridge & Frederick W. Tourtelotte, plaintiffs in error, vs. James Hill, treasurer of the county of St. Joseph. W. Michigan C. C. U. S. Filed 18th October, 1875.



IN THE

Supreme Court of the United States.

HAMILTON N. ELDREDGE ET AL., PLAINTIFFS IN ERROR.

vs.

JAMES HILL, TREASURER OF THE COUNTY OF ST. JOSEPH.

This is a writ of error to the Circuit Court of the United States for the Western District of Michigan.

STATEMENT OF THE CASE.

In June, 1872, there were stolen from the office of the register of deeds for the county of St. Joseph, in the State of Michigan, certain books and papers, records of the office of register of deeds of said county, and certain detectives had been engaged in the attempt to find them.

On the 6th day of September, 1872, the county, by its officers, deposited with the plaintiffs in error, defendants below, the sum of $3,500 upon the following terms and agreement: That in case all of said books and papers should be returned to said county, so that they should come to the possession of the officers of said county, then the plaintiffs in error should pay the money over to the parties causing said books and papers to be returned, the books to be delivered before the 12th day of September, 1872, or the money should be returned to the county. And it was further agreed, that a failure to deliver some small paper or papers should not invalidate the agreement.

On the 7th of September one Wilson, a detective, who was known to the plaintiffs in error to have been engaged in searching for said records presented to the plaintiffs in error a receipt signed by W. W. Hatch, deputy sheriff of the county, as follows:

"I have received from somebody forty-four books for St. Joseph County, also papers, and small index-books.

(Signed) W. W. HATCH."

Thereupon the plaintiffs in error paid the $3,500 to said Wilson. The forty-four books returned were all the books stolen. Subsequent to such payment, and on the same day an officer of the county telegraphed to plaintiffs in error to hold the money. But the money had already been paid over. Thereupon the county brought suit against the plaintiffs in error to recover the $3,500 so deposited with them, and so paid by them to said detective; recovered judgment in the court below, and this writ of error is presented to reverse the judgment.

ASSIGNMENTS OF ERROR.

First. The court erred in overruling the objection made by counsel for the defendant, to the introduction of the said contract in evidence, and in admitting the same to be read in evidence for the reason that the said contract is not the contract declared upon, and that the same is irrelevant and immaterial.

Second. That the said court erred in instructing the jury that the question whether or not the return of so much of the books in question as were legible and remaining was a return of the said books, and all of them, within the meaning of the contract in evidence, was question partly for the court and partly for the jury; for the reason that there being no conflict or dispute as to the condition of the said books, the question as to whether the facts proven constituted a substantial return of all of the said books within the meaning of the said contract, is a question of law for the court, and not a question of fact to be submitted to the jury.

Third. That the court erred in instructing the said jury that they were to find whether or not the condition of the said books was so far defective and incomplete, when returned to the officers of said county, as to render one or more of the books so far useless as to be no longer one of the records for which, among others, the reward was offered and agreed to be paid; for the reason that there was no evidence in the case upon which to base such a finding.

POINTS.

I.

The objection made to the contract offered in evidence founded upon its variance in date from the one set out in the declarations, should have been sustained. The slightest variance in a matter descriptive of a contract is a fatal variance.

In *Spangler* v. *Pugh*, 21 Ill., 85; it was held that difference of one-half cent between note declared on, and one offered in evidence was a fatal variance.

In *Streeter* v. *Streeter*, 43 Ill., 155, the same rule was held.

The court at the trial might have permitted an amendment of the pleadings, but without the amendment the variance was fatal.

II.

The charges of this court that whether the return of said books in their illegible condition was a compliance with the contract, was in part a question of fact, was erroneous, because there being no conflict as to the condition of the books, it was purely a question of law whether the contract had been complied with or not, and the court should have determined the question.

The contract was not for a return of the books in the same condition as when stolen, and therefore a return of the books although partially illegible, defaced, or mutilated, was a compliance with the terms of the contract, and the court should so have instructed the jury. When the contract was

made for a return of these forty-four books it must, in the absence of other provisions, be assumed that the parties contemplated a return of the books in the condition in which they were at the making of the contract.

Suppose such a contract had been made to secure the return of a horse that had been stolen, and the horse should, in fact, be recovered and returned; would the fact that the thief had overridden the horse and injured him constitute a defense

Every contract must be construed with reference to its subject-matter, and read in the light of the circumstances surrounding the party at the time of its execution. Had the parties here contracted to deliver to the county blank books to be used in the office, it would be intended that the books were to be delivered in merchantable condition. But these books had been stolen, and the fair presumption was that they had been stolen for the purpose of mutilating some record, and that they might have been damaged by the manner in which they had been secreted and kept. Nevertheless each volume was valuable to the county if it contained any perfect record. And the absence of any provision in the contract as to the condition in which the books should be returned, shows the anxiety of the county, as it was its duty to recover them in whatever condition they were. This was the contract, and this contract was performed. It is conceded that the forty-four books returned are the identical books mentioned in the contract.

III.

The plaintiffs in error had no interest in the contract, and received no compensation under it. They were answerable only for *gross neglect*. It is neither charged nor pretended that they acted in bad faith. And the payment of the money upon the deputy sheriff's receipt, presented by the detective known to the plaintiffs in error to have been engaged in searching for the books, cannot be regarded as a violation of the duty imposed upon the plaintiffs in error by the contract; and the court should so have instructed the jury.

CARPENTER & COLEMAN,
Counsel for Plaintiffs in Error.

UNITED STATES OF AMERICA.

The Supreme Court of the United States.

No 237

HAMILTON W. ELDRIDGE and FREDERICK W. TOURTELOTTE, Plaintiffs in Error,

vs.

JAMES HILL, Treasurer of the County of St. Joseph, for the use and benefit of said County, Defendant in Error.

In Error to the Circuit Court for the Sixth Circuit and Western District of Michigan.

BRIEF OF DEFENDANT IN ERROR.

EDWIN W. KEIGHTLEY, Att'y for Defendant in Error.
H. H. RILEY, of Counsel.

CONSTANTINE, MICH.:
L. T. HULL, BOOK AND JOB PRINTER.
1878.

UNITED STATES OF AMERICA.

THE SUPREME COURT of the UNITED STATES

HAMILTON W. ELDRIDGE and FREDERICK W. TOURTELOTTE, Plaintiffs in Error,

vs.

JAMES HILL, Treasurer of the County of St. Joseph, for the use and benefit of said County, Defendant in Error.

In Error to the Circuit Court for the Sixth Circuit and Western District of Michigan.

STATEMENT OF CASE.

This action was brought by the Defendant in Error against the Plaintiffs in Error, in the Circuit Court for the County of St. Joseph, and State of Michigan, on the 22d day of November, A. D. 1872, by summons, and served on the defendant Tourtelotte the same day. Subsequently, proceedings were had to remove the same to the Circuit

Court of the United States for the Western District of Michigan, and the same was so removed, where both of the defendants put in a plea and notice by Ball & Wolcott, their attorneys.

There were two counts in the declaration: First, by way of inducement, it is set forth that on the 28th day of June, A. D. 1872, there were stolen from the office of the Register of Deeds of the County of St. Joseph certain books and papers, describing the volumes of books by numbers, being about forty volumes in all, and also said papers, being the records of said county, and that no clue could be ascertained which would tend to their recovery, until the 6th day of September, A. D. 1872, when the defendants below undertook to procure their return, &c., &c., in as good condition as when taken away, &c., within a certain time for a certain consideration, to be deposited with the defendants below, &c., &c., *which said contract was and is in the words and figures following, that is to say:*

The contract is then set out in full:

1st. Recites the loss of the books, and giving the numbers of the books claimed to be lost.

2d. The anxiety of the Supervisors of the County of St. Joseph to obtain possession of the same, and that several persons had been engaged to get possession of the same.

3d. That if said books and papers shall be returned to said Supervisors so that they shall come to their possession, they will pay for said return $3,500.

4th. $3,500, the contract says is deposited by the Supervisors and Treasurer in the hands of the plaintiffs (defendants below), which is held by them "until said books and papers shall be returned to said county, and when so delivered to said county, the said sum so deposited in said El-

dridge & Tourtelotte's hands shall be paid and delivered to said parties so causing said books and papers to be so returned to said county, and if *all of them* are not delivered to said county on or before the 12th day of September, A. D. 1872, then said moneys so received by said Eldridge & Tourtelotte shall be returned to and given back to said Treasurer of said county," which contract bears date September 6, 1872, and is signed Wm. M. Watkins, Com. Board Supervisors, James Hill, County Treasurer, E. F. Peirce, Sheriff, and H. W. Eldridge and F. W. Tourtelotte.

The following note is appended, signed "Wm. M. Watkins, County":

"It is understood that any failure to deliver some small paper or papers, shall not invalidate the above agreement."

5th. The declaration then avers the deposit of the $3,500 with the defendants according to the conditions of the contract.

6th. That although the time is elapsed, specified in the contract for the return of said books and papers, they have not been delivered to said county, of which defendants had notice, and that defendants though requested, &c., have not returned to plaintiff (defendant herein) the $3,500 so deposited in their hands, by virtue of said contract, &c., but refuse to do so, &c., &c.

The second count differs somewhat in this respect, and avers that the defendants not only did not deliver said books and papers according to their agreement so to do, and well knowing where they were, wantonly and wilfully abandoned them, to wit: on the 7th day of September, A. D. 1872, in and by a pit dug in the woods, or open fields in the township of Lockport in the county of St. Joseph, exposed to the weather without any covering or protection, and when discovered they were greatly damaged, and rendered

thereby in many places illegible, and to such an extent as to render the copying of a large number thereof, to wit: twenty volumes, necessary, at a cost of $3,500; that they were found in that condition and restored to the county of St. Joseph by other than the defendants, or those connected with them; that the county refused to receive the same as a compliance of said defendants with their contr ct, of which defendants had notice, &c.; that the defendants now refuse to repair and make good, or account for the great damage, or to refund the $3,500, &c.

Also, under the common counts, in $5,000 for money lent by plaintiff (below) to defendants; and like sum for money had and received by the defendants from plaintiff for the use of defendants; and like sum for money found due from defendants to plaintiff, on an accoun stated, &c.

(See Record, pages 3 to 10 inclusive.)

The case came on for trial on the 9th day of December, 1874, and the record shows:

That the plaintiff gave evidence tending to show that certain books of records and mortgages, &c., relating to titles to land in St. Joseph County, Michigan, were stolen on the night of the 28th day of June, A. D. 1872, and also other papers left for record, &c.; that sundry efforts were made to recover the same, all of which were fruitless up to the 5th of September, A. D. 1872; that on the 5th of September, 1872, the plaintiff together with other officers of the county of St. Joseph, entered into an agreement, the substance of which is heretofore given, and is also recited on page 27 of the record in full, which agreement was offered in evidence, and objected to by counsel for the defendants, "Because it was not the contract set forth in the declaration, and was immaterial and irrelevant." But the Judge overruled the objection, and admitted the contract in evidence. See Record, pages 26 and 27.

The evidence of the plaintiff tended farther to show that on the night of the 6th and 7th of September, 1872, the said books and papers were pointed out to one Winslow W. Hatch, a deputy sheriff of the county of St. Joseph, at the side of a pit dug in the woods, by a stranger, who requested Hatch to receipt for the same, who did so at that time and place. That Hatch immediately returned to Three Rivers, about a mile distant, aroused Wm. M. Watkins, a Supervisor of the county, and E. F. Peirce, the sheriff, and the said books were taken by them to the Court House of said county, at the village of Centreville, at which place they arrived between 12 and 2 o'clock of the same night, where the books and papers were examined, and found to be saturated with water, and the books in a badly damaged condition. Nothing was done to show that the officers of the county accepted the books and papers as a compliance with the contract, unless opening the leaves of the books and interleaving them with blotting pads and papers to dry them be considered so. All of the papers lost were found to be returned except one deed and two powers of attorney, being 44 volumes; that one leaf was missing from one book, and three from another; that the covers were damaged of several of the books from exposure and wet; that portions of some other leaves were lacking, and in some of the books a large number of parts of pages were gone, several pages illegible, the writing so far defaced as not to be capable of being transcribed; that it had been necessary by the county officials to cause several of said books to be transcribed, which had been done. See Record, page 29. That immediately upon ascertaining the damaged condition of the books the said E. F. Peirce proceeded to Three Rivers, arrived there about 4 in the morning of the 7th of September, the train for the west being at that place, and at once sent a dispatch to the defendants reading as follows: "Hold money—will come on first train," then took the train to Chicago, and arrived there about 10 A. M. of that day. Soon after went

to the office of defendants, but did not find them. After dinner went there again, found defendant Tourtelotte, who said he did not receive dispatch until he returned from court, about noon, and that he had paid over the money at about 8 A. M., at his office, to a man named Wilson, who presented the receipt of W. W. Hatch. That Tourtelotte resided about one and a half miles from his office, and the parties, Peirce and Tourtelotte, had angry words between them, and Tourtelotte finally ordered Peirce out of the office. Record, page 30.

The record then shows, on the part of the defendants: That Tourtelotte arrived at his office about half past seven o'clock on the morning of the 7th September, aforesaid; that he found one Wilson, a detective, with the view to obtaining the reward deposited with defendants; that Wilson demanded the said sum of money be paid to him, saying the books had been returned, at the same time producing the following receipt:—

"I have received from somebody 44 books for St. Joseph county; also, papers and small index books.

(Signed) W. W. HATCH."

And thereupon he paid to said Wilson the sum of $3,500; that about 9 A. M., Tourtelotte left his office, and went to court, and did not return until noon; that Eldridge was also absent from the office; that when both were absent the telegram arrived, but remained unopened until the return of Tourtelotte from court. Record, page 31.

BRIEF.

The first assignment of error is:

The Court erred in overruling the objection made by counsel for the defendant, to the introduction of the said contract in evidence, and in admitting the same to be read in evidence for the reason that *the said contract is not the contract declared upon, and that the same is irrelevant and immaterial.*

As the contract is set out in full in the declaration, the reason why it is *not the contract declared upon is ambiguous.*

Assignments of error must be specific.

Polhemus v. Ann Arbor Savings Bank,
27th Michigan 44.

An ambiguous assignment of error should be construed most favorably for the party against whom it is made.

Browne v. Moore, 32d Michigan 254.

Under an exception to the admission of evidence, it is incumbent on the plaintiffs in error to show the error satisfactorily, and if the exception is too *vague* to enable the Court to see clearly that the testimony was illegal, the judgment will not be reversed.

Violett v. Patton, 5 Cranch 142.

It is the duty of the party excepting to evidence *to point out the part excepted to*, so that the attention of the Court may be drawn to it—if the exception covers any admissible evidence, it is rightly overruled.

Moore v. Bank of the Metropolis, 13 Peters 302.
Ventress v. Smith, 10 Peters 161.
13 P. 302.

A naked statement on the record that the reading of a *copy of a record*, without disclosing the nature or ground of the objection is nugatory and wholly ineffectual in a Court of Error.

Camden v. Doremus, 3 Howard 515.

No reason is given in the record, on the trial below, why the contract offered is not the contract declared upon.

Counsel in their *argument* gave a reason, but the *record* shows none; nor was any broader reason given for the exception than appears in the record.

If, however, the Court think we are wrong, and that the reason for the exception *is* sufficient, we are driven to pick it out of the *argument* below, which was, in short, that the *inducement* in the declaration is broader than the contract, and inconsistent with it.

We deny this. But if it is, we submit the contract will govern when set out in full.

If we seek to test the correctness of our position in this respect to what lights are we to look? We submit that we should look to the practice, pleadings, and forms and modes of proceeding existing at that time in the State of Michigan, and the decisions of the Court of last resort in that State thereon.

By Section 914 of the Revised Statutes (being part of the Act of June 1st, 1872), it is provided: "The practice, pleadings, and forms and modes of proceeding in civil causes in the Circuit and District Courts shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held, any rule of Court to the contrary notwithstanding."

Practically this is but a confirmation of the law before existing.

Elmore v. Grimes, 1 Peters 469.
Wilcox v. Hunt, 13 Peters 378.
U. S. v. Robeson, 9 Peters 319.
Townsend v. Jennison, 7 Howard 706.
United States v. Council of Keokuk, 6 Wallace 576.
McNutt v. Bland, 2 Howard 17.
Sears v. Eastburn, 10 Howard 187.
Ward v. Chamberlain, 2 Black 436.
Townsend v. Todd, 91 U. S. (Otto) 452.
Nudd, et al., v. Burrows, assignee, 91 U. S. (Otto) 440.
Sawin, adm'r, v. Kenney, 93 U. S. (Otto) 289.

This point came up in the Supreme Court of Michigan. Regents of the University v. Detroit Young Men's Society, 12th Michigan, 138, *on demurrer*. The Court say: "Had the declaration only attempted to set forth the contract according to its *legal effect*, doubtless there must have been a variance in the proof; but when the instrument is set forth in full the Court are to say what is its legal effect, and any allegation in respect to the description or effect of the instrument in a matter which must appear upon its face as set forth, is we think, entirely superfluous, and may, and should be rejected as surplusage."

The second assignment of error is:

That the Court erred in instructing the jury that the question whether or not the return of so much of the books in question as were legible and remaining, was a return of said books and all of them within the meaning of the contract in evidence, was a question partly for the Court and partly for the jury; for the reason, that there being no conflict or dispute as to the condition of the said books, *the question as to whether the facts proven constituted a substantial return of all the said books within the meaning of the said contract*, is a question of law for the Court and not a question of fact to be submitted to the jury.

The question of a return of the books under the contract was a question of fact; what facts were necessary to constitute a return was, we submit, a question of law and fact. And so the Court charged.

The defendants below agreed "to hold the deposit *until the said books and papers shall be returned to said County*."

(Record, page 27.) The record also shows (page 29), "that from one of said books one leaf, and from another of said books three leaves were missing; that the covers of several of said books were damaged by exposure to such an extent as to render them worthless; that portions of some other leaves were lacking, and that in some of said books a large number of parts of pages were gone, *several pages illegible, the writing so far defaced as not to be capable of being transcribed; that it had been deemed necessary by the County officials to cause several of said books to be transcribed, which had accordingly been done.*"

The Court charged (Record page 35), "You are hereby instructed that whether books returned in view of their defective condition is to be determined by ascertaining whether substantially the County received that for which the officers agreed to pay $3,500. If so, there can be no recovery in this action: if not, plaintiff is entitled to recover. No book was lacking, but there were absent leaves and parts of leaves; portions of pages were illegible, or wholly obliterated in one or more books. Did their defective and incomplete condition render one or more of the books *so far useless* as to be no longer one of the records for which, among other things, *the reward was offered and agreed to be paid.*"

Again (Record, page 35), the Court says, "this might well be tested by determining whether these defective books were in a condition that substantially preserved to the County the contents of the records of the County titles. Practically, for all essential uses in determining titles to the lands of the county recorded in these volumes, did those books still remain the silent witnesses and adequate evidence

of the county land titles. The Court instructs you that such the books should be, when returned, to justify the defendants parting with their money to the unknown parties causing their return. *There were no stipulations or terms which required the books to be returned in the same, or as good condition as when lost.* The fact that the volumes were damaged, soiled, wet, discolored, some torn leaves, even illegible and absent parts, all this may not be conclusive; *they are facts for you to consider* in determining whether the records as returned were or were not essentially the records for which the reward was offered."

The question submitted was *whether the books agreed to be returned were returned.*

We submit that this question was a question of fact under the charge of the Court.

Whether there is any evidence on a point is a question of law for the Court. Whether the evidence is sufficient to convince or satisfy, is a question for the jury.

1 Greenleaf on Evidence, Sec. 49, note 1 and cases there cited.

Lloyd v. Scott, 2 Cranch C. C. 206–218.

This was not the only question of fact in the case, and we therefore submit that the case could not be taken from the jury. *Whether or not the officers of the County had accepted the books,* was a fact to be determined by the jury

Wilson's Am Juror 46
Proffat on Jury Trial Sec 321 Et Seq
Wells Law & Fact 85
Drakely vs Gregg 8 Wall 242
Hickman vs Jones 9 Wall 201
Way vs Mis I.C.R.R.Co 88 Iowa 688
Fish vs Davis 62 Barb 122
Sawyer vs Nichols 40 Me 214
Greene vs R.R.Co 38 Iowa 100
Worcester Mid Inst vs Harding 11 Cush 289
Mullaly vs Austin 91 Mass 80
Gr.I.R.R.Co vs Nichols 18 Mich 170
Ins Co vs Baring 20 Wall 159
Shimmel vs Migale 42 Ind. 574
Townsend vs The State 2 Black'f 167

—and the Court charged (Record, page 34), "You are instructed that if the books and papers were so returned to St. Joseph County that they came into the possession of the officers of the county, the return was sufficient, (the Court giving more definite instructions as he continued his charge on this point, see Record, page 34).

The third assignment of error is:

That the Court erred in instructing the jury that they were to find whether or not the condition of said books was so far defective and incomplete when returned to the officers of said county, as to render one or more of the said books so far useless as to be no longer one of the records for which, among other things, the reward was offered and agreed to be paid; for the reason *that there was no evidence in the case upon which to base such finding.*"

We submit to the Court that there *is* evidence to support the charge; see last paragraph page 29, Record.

See, also, authorities next above cited.

The fourth assignment in error is:

That the Court erred in overruling the motion made for a new trial of the said cause:

Finding the *reasons* for the motion on Record, page 37, they are:

1st. That the verdict is unsupported by the evidence.

That is, we suppose, *contrary* to evidence. The Court will grant a new trial if the verdict is palpably and clearly contrary to evidence. 1st Burr, 390; 6th Hill, 44. That is, if the justice of the case required it: 1 M. & S., 576; but not otherwise; 4 T. R., 468; 3 Wils., 273; 2 Burr, 396.

2d. That said verdict is against the evidence exhibited in said cause.

If the evidence is against the evidence, which we deny, this Court will not set it aside against the *weight* of evidence —Douglass v. Tousey, 2 Wendell, 352;—At all events there must be a *decided preponderence;* Jackson v. Loomis, 12 Wendell, 27; Smith v. Hicks, 5th Wendell, 48; 12th Wendell, 27; 6th Ohio, 456; even though it be contrary to the charge of the Court; 7th Cowen, 202; nor where it would hardly be reconcilable to conscience; 3d B. and C., 357; 5th Ohio, 109; Wickersham v. The People, 1 Scam., 130; State v. Sims, 2 Bailey, 29; State v. Hooper, Ib., 37; 2 Strobh. 60; Giles v. State, 6 Ga., 276; State v. Fisher, 2 Nott & McCord, 261.

3d. That the said verdict is against the instructions of the Court to said jury, and we say to that:

We refer to the charge and claim that it is *not* contrary to the instructions of the Court.

4th. The said jury erred in the application to the proven facts of said cause of the rules of law given to said jury by the Court in its instructions.

This is only saying what was said in the 2d point, that the verdict is against the evidence.

We further insist, also, that the position of the plaintiffs in error as to this point is wholly untenable for the reason that a decision on a motion for new trial being addressed to the sound discretion of the Court cannot be made the subject of review in the higher Court. This has been repeatedly held both by this Court and the Supreme Court of the State of Michigan.

Warner v. Horton, et al., 20 Howard 48.
Laber v. Cooper, 7 Wall. 565.
Pomeroy v. State Bank, 1 Wall. 592.
Blunt v. Smith. 7 Wheaton 248.
Pennsylvania Co. v. Brady, 14 Mich. 260.
Final v. Backus, 18 Mich. 218.
Lindsey v. Lee, 1 Dev. (N. C.) L. 465.
Burkholder v. Stahl, 58 Pa. State 371.

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